

8

No. 91-1200

Supreme Court, U.S.  
**FILED**  
**MAY 29 1992**  
OFFICE OF THE CLERK

In The  
**Supreme Court of the United States**  
October Term, 1991

THE CITY OF CINCINNATI,

*Petitioner,*

v.

DISCOVERY NETWORK, INC., et al.,

*Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit

BRIEF AMICUS CURIAE OF  
LEARNING RESOURCES NETWORK  
IN SUPPORT OF RESPONDENTS

BRUCE R. STEWART  
*Counsel of Record*  
CHARLES H. CARPENTER  
PEPPER, HAMILTON & SCHEETZ  
1300 Nineteenth Street, N.W.  
Washington, D.C. 20036  
(202) 828-1200

*Attorneys for Learning  
Resources Network*

Dated: May 29, 1992

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTEREST OF <i>AMICUS CURIAE</i> .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	4
CONCLUSION .....	12

TABLE OF AUTHORITIES

Page

CASES:

<i>Board of Trustees v. Fox</i> , 492 U.S. 469 (1989).....	11
<i>Bolger v. Youngs Drug Products Corp.</i> , 463 U.S. 60 (1983).....	10
<i>Central Hudson Gas &amp; Electric v. Public Service Comm'n</i> , 447 U.S. 557 (1980).....	11
<i>Consolidated Edison Co. v. Public Service Comm'n</i> , 447 U.S. 530 (1980).....	11
<i>Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council</i> , 425 U.S. 748 (1976).....	9

STATUTES:

90 Stat. 2081, Education Amendments of 1976.....	5
--	---

MISCELLANEOUS:

<i>Durkin, Struggling to Teach: Growing Success Puts Free College in Red</i> , Wash. Post, July 12, 1990.....	6
R.M. Hutchins, <i>Preface to 1 Great Books of the Western World</i> (1955).....	4
<i>Sanchez, Johns Hopkins to Broaden Its D.C. Operation</i> , Wash. Post, Jan. 14, 1992 .....	7
U.S. Department of Education, <i>Digest of Education Statistics</i> (1989).....	5, 6, 10
C. Van Doren, <i>Benjamin Franklin</i> (1938).....	4
Waterman, <i>How to Succeed in Two Easy Lessons</i> , Wash. Post, Jan. 4, 1990 .....	6

No. 91-1200

In The

Supreme Court of the United States

October Term, 1991

THE CITY OF CINCINNATI,

Petitioner,

v.

DISCOVERY NETWORK, INC., et al.,

Respondents.

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Sixth Circuit

BRIEF AMICUS CURIAE OF  
LEARNING RESOURCES NETWORK  
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

Learning Resources Network ("LERN") is an association of providers of adult and continuing education.<sup>1</sup> Founded in 1974, LERN is comprised of approximately 5,000 public and private educational organizations, approximately 1,200 of which are non-profit educational institutions with organizational memberships. LERN's members include state universities, private colleges,

<sup>1</sup> This brief is filed pursuant to Rule 37.3 of the Rules of this Court, accompanied by the written consent of all parties.

community colleges, public elementary and secondary schools, hospitals, museums, city and county recreation departments, and churches, as well as private for-profit education program providers.<sup>2</sup>

---

<sup>2</sup> The breadth and geographic diversity of LERN members is reflected by LERN's board of directors:

President-Elect	President
Dr. Richard T. Walsh	Greg Marsello
R.T. Walsh & Associates	Imperial Pearl Co.
Wallingford, Pennsylvania	Providence, Rhode Island
Greg Spears, Dean	D. Searcy, Director
Community Education	Covington Campus
Camosun College	Northern Kentucky University
Victoria, British Columbia	Covington, Kentucky
Dr. Grace Smith, President	Sandra Geisinger
Smith Associates, Inc.	Schenectady, New York
Troy, Michigan	LaNeta L. Carlock, Director
Francis Chiaramonte, Dean	Westside School
Continuing Education	Community Education Center
Hartford Community College	Omaha, Nebraska
Hartford, Connecticut	Willie J. Richardson, Jr.
Ken Cicora	Delta College
Ft. Lauderdale Parks	University Center, Michigan
and Recreation	Hugh B. Hammett
Ft. Lauderdale, Florida	Empire State College
Mary Lou Harris	Continuing Education
Assistant Director	Saratoga Springs, New York
Continuing Education	Rebecca Strong,
Ohio University	Associate Dean
Athens, Ohio	Community Services
Mary Anne Varacalli	McHenry County College
Delaware County	Crystal Lake, Illinois
Community College	
Media, Pennsylvania	

Among LERN's most important functions is its role as a research organization, information clearinghouse, and forum in which members exchange information regarding successful practices in educational programming, including practices relating to the marketing and promoting of course selections to the public. Through this exchange of ideas and techniques, LERN and its members have developed substantial expertise in marketing and promoting adult and continuing education programs.

Many of the members of LERN distribute information about their course offerings and programs in a manner similar or identical to the manner chosen by respondents - that is, by the use of newspaper boxes for the distribution of free pamphlets, newspapers or fliers on municipal sidewalks. As a result, LERN and its members are concerned that, should the Court reverse the decision below, other municipalities may follow Cincinnati's example and attempt to regulate communication with prospective students. Such a result would cause educational providers, prospective students, other information providers and their recipients great hardship in continuing to carry on their dialogue with each other.

---

### SUMMARY OF ARGUMENT

Adult and continuing education has played a long and distinguished role in the intellectual life of the Nation. Education providers such as the members of LERN depend to a great extent on the continued availability of streetcorner newspaper boxes as a cost-effective means to distribute information about their offerings.



There are no adequate alternatives for providing affordable dissemination of course catalogs to the segments of the student population reached by streetcorner newspaper boxes. In addition, LERN and its members are concerned that petitioner and its *amici* may attempt to use the designation "commercial speech" as a vehicle to accomplish content-based time, manner, place restrictions. Even if such an attempt was permissible, it would not be warranted given the information contained in the course catalogs.

## ARGUMENT

### A.

Western intellectual history has been likened to a great conversation across the ages.<sup>3</sup> Adult and continuing education is an important vehicle for allowing ordinary citizens to take part in the conversation. Since Benjamin Franklin started his Junto discussion group in 1727,<sup>4</sup> adult and continuing education has played an important role in American intellectual life. Indeed, the importance of adult and continuing education has been explicitly recognized by Congress, which has found, *inter alia*, that "lifelong learning . . . enable[s] citizens] to adjust to social, technological, political and economic changes" and "to participate in the civic, cultural or political life of the

<sup>3</sup> R.M. Hutchins, *Preface to 1 Great Books of the Western World* at xi (1955).

<sup>4</sup> C. Van Doren, *Benjamin Franklin* 74-80 (1938). Franklin seems to have borrowed the idea from Cotton Mather. *Id.* at 75.

Nation."<sup>5</sup> By all accounts, interest in adult and continuing education has been increasing.<sup>6</sup>

<sup>5</sup> Specifically, in addressing adult and continuing education Congress has found that:

"(1) accelerating social and technological change have had an impact on the duration and quality of life;

(2) the American people need lifelong learning to enable them to adjust to social, technological, political and economic changes;

(3) lifelong learning has a role in developing the potential of all persons, including improvement of their personal well-being, upgrading their workplace skills, and preparing them to participate in the civic, cultural, and political life of the Nation;

(4) lifelong learning is important in meeting the needs of the growing number of older and retired persons;

. . .

(7) more effective use should be made of the Nation's educational institutions in order to assist the people of the United States in the solution of community problems such as housing, poverty, government, recreation, employment, youth opportunities, transportation, health, and land use; and

(8) American society should have as a goal the availability of appropriate opportunities for lifelong learning for all its citizens without regard to restrictions of previous education or training, sex, age, handicapping condition, social or ethnic background, or economic circumstance."

Education Amendments of 1976, Pub. L. 94-482, § 101, 90 Stat. 2081, 2086 (now codified at 20 U.S.C. § 1002 (1988)).

<sup>6</sup> The United States Department of Education estimates that in 1984 some 23 million people took adult education classes, of which only about 5 percent were enrolled as full-time students in a degree program. U.S. Department of Education,

(Continued on following page)

Contemporary course offerings are not restricted to the great ideas. In virtually every major city in the United States – and in many smaller cities as well – an adult may enroll in courses concerning virtually any subject, from French literature to computer programming.<sup>7</sup> These courses enrich the lives of their students by providing citizens access to cultural and vocational opportunities that would not otherwise be available. They also add to the common heritage of American society. Other courses, which teach survival skills such as literacy or self-health and wellness, offer a more fundamental value to students and to society. Perhaps as important as the content of any particular course, students taking adult and continuing courses benefit from their continued interest in self-improvement. As a society we are improved by the efforts

---

(Continued from previous page)

*Digest of Education Statistics* 319 (1989) ("Digest of Education Statistics"). The Department also estimates that in 1982 more than 5 million adults were enrolled in adult and continuing education programs. *Id.* at 318. LERN estimates that the number participating may now approach 15 million people. In 1989, courses offered by the Fairfax County, Virginia, public school system alone attracted 55,000 adult students. Waterman, *How to Succeed in Two Easy Lessons*, Wash. Post, Jan. 4, 1990, at J9. Programs around the country are experiencing increasing enrollments. See, e.g., Durkin, *Struggling to Teach: Growing Success Puts Free College in Red*, Wash. Post, July 12, 1990, at J1.

<sup>7</sup> Among the more notable educational offerings in adult and continuing education was a course in constitutional law taught at Washington Saturday College by Chief Justice Warren in 1968. Durkin, *Struggling to Teach: Growing Success Puts Free College in Red*, Wash. Post, July 12, 1990, at J1.

of individual members to improve themselves, particularly those who may be outside the scope and reach of traditional, formal post-secondary education.

From its beginning, adult and continuing education has been a decentralized, student-driven endeavor. In each locale, the educational offerings are tailored, often by the discipline of the marketplace, to the needs and wishes of the student population. Unlike more formal post-secondary education, adult and continuing education is designed to reach the broadest possible student population.<sup>8</sup> Inclusiveness and ready access are guiding principles.

These principles and the diversity of program offerings compel educational providers to use methods of disseminating information about programs that reach into every segment of society. Streetcorner newspaper boxes are an important part of this dissemination process, as they provide one of the most cost effective ways to provide detailed information concerning the course offerings to the widest range of potential students. Although adult and continuing educators use a variety of means to communicate with the communities they serve, there are no adequate alternative methods which replicate all the advantages of streetcorner newspaper boxes.

---

<sup>8</sup> In recognition of the fact that these programs serve a distinct student population, approximately 2,500 of the nation's 3,600 colleges and universities also offer adult and continuing education programs. Indeed, part-time college study, which includes adult and continuing education, is the fastest-growing segment of higher education nationwide, accounting for some 6 million students. Sanchez, *Johns Hopkins to Broaden Its D.C. Operation*, Wash. Post, Jan. 14, 1992, at B2.



For example, many educators distribute information through public libraries, typically using either a pamphlet rack or bulletin board. While library distribution is an important method of reaching some of the potential students of adult and continuing educational offerings, only library patrons may be contacted in this manner. But many potential students, including perhaps those most in need of literacy programs, are not likely to be reached through library distribution.

Another method for disseminating information is mass mailings of course catalogs. This alternative to streetcorner newspaper boxes, however, is also unsatisfactory. First, bulk mailing is prohibitively expensive.<sup>9</sup> Second, unlike streetcorner newspaper boxes from which only truly interested potential students take course catalogs, mass mailings by definition mean providing catalogs to persons who have no interest in taking courses. Coupled with the inefficiency in targeting mass mailings, mailing costs many times more per enrolled student than newspaper box distribution.

A third distribution alternative to streetcorner newspaper boxes is newspaper inserts, which involves inserting a course catalog inside a newspaper, which is then sold at the newspaper's regular outlets, including

---

<sup>9</sup> The cost of mass mailing has been increasing. The standard nonprofit postal bulk rate has doubled in the last three years. LERN estimates that it costs around \$150.00 per thousand brochures for distribution by mail as opposed to \$25.00 per thousand for distribution by streetcorner newspaper box.

streetcorner newspaper boxes. Inserts, however, have the same negative cost and targeting attributes of mass mailings.<sup>10</sup>

## B.

The issue of whether adult and continuing education course catalogs were properly characterized by the district court as "commercial speech" is not now directly before the Court.<sup>11</sup> However, LERN and its members are concerned about this categorization.

Among LERN's members are public entities such as public school systems, municipal recreation departments, and state universities. The continuing education course catalogs of such institutions do not "propose a commercial transaction." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 762 (1976). This is true even when a nominal enrollment fee is charged, because, as a matter of common sense, education is not a

---

<sup>10</sup> By permitting streetcorner newspaper box distribution of for-profit newspapers but not educational materials standing alone, petitioner appears to argue that newspaper box distribution of adult and continuing education materials is permissible, but only if the education provider pays the newspaper to allow the materials to be inserted. As newspaper boxes containing newspapers with inserts present the same aesthetic and safety features as newspaper boxes containing only the inserts, it is difficult to discern the community interest served by compelling education providers to use inserts.

<sup>11</sup> Respondents did not appeal the district court's determination that their publications are commercial speech.

"commercial" activity when carried out by a public body.<sup>12</sup> Yet such catalogs are virtually identical in both form and content to those prepared by privately operated adult and continuing education providers.

The membership of LERN includes both for-profit and non-profit educators.<sup>13</sup> LERN's experience quite plainly suggests that there is no significant difference in either the substance of the educational offerings,<sup>14</sup> the catalogs, or in the methods of distributing course catalogs<sup>15</sup> between education providers that may happen to have different corporate structures. For this reason, any attempt on the part of Cincinnati – or any other municipality – to distinguish between the course catalogs of one kind of provider and those of another bears little relationship to the interests advanced by petitioner. Streetcorner newspaper boxes containing the course catalogs of non-profit educational offerings present the same aesthetic and safety features as those containing for-profit catalogs,

---

<sup>12</sup> Even if a course catalog may be characterized as commercial speech, it may not be regulated as such if the actual content of the course offerings is protected speech. See *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 n.14 (1983).

<sup>13</sup> The United States Department of Education found 8,469 noncollegiate institutions offering post-secondary education in 1987-88. *Digest of Education Statistics* at 324. Of these, 659 were publicly owned, 1581 were private non-profit, and 6,229 were private for-profit. *Id.* This survey did not include public schools and municipal recreation departments.

<sup>14</sup> Typically, for-profit educators will pioneer new types of courses, which, if successful, will be subsequently offered by non-profits as well.

<sup>15</sup> Non-profits are charged lower postal rates for mailing course materials and catalogs.

or, for that matter, those containing for-profit newspapers. By arguing that it may regulate for-profit course catalogs because they are commercial speech, petitioner and its *amici* apparently seek to assert that a distinction can be made between identical speech acts based solely on the identity of the speaker.<sup>16</sup>

Categorizing speech as non-commercial or commercial may be helpful in analyzing certain cases. This is not such a case, however. The category of commercial speech serves mainly to allow states to protect against effects related to the content of speech. See, e.g., *Board of Trustees v. Fox*, 492 U.S. 469, 475 (1989) (protecting educational atmosphere while preventing commercial exploitation of students at a state university). In this case, however, petitioner has expressed no interest whatever in the content of respondents' speech, but is merely using the lowered standard of review applicable to the regulation of commercial speech as a vehicle to justify the otherwise impermissible: a content-based time, manner, place restriction. See *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980) (time, manner, place restrictions must be content neutral).

---

<sup>16</sup> One might try to distinguish the speech of private entities from those of public ones on the ground of motive, an approach not without difficulties. See *Central Hudson Gas & Electric v. Public Service Comm'n*, 447 U.S. 557, 579-80 & n. 2 (1980) (Stevens, J. concurring). In any event, at the speech act level, the motive is the same: The education provider prints and distributes catalogs hoping to attract students to the courses. Facile distinctions based on ownership or corporate structure do not meet the regulator's burden of "distinguishing the harmless from the harmful." *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989).



\* \* \*

Adult and continuing education providers, whether public or private, profit or non-profit, depend to varying degrees upon streetcorner newspaper box distribution. All types of continuing educators, not merely private, for-profit educators such as respondent Discovery Network, Inc., share an indivisible interest in the continued availability of this method of distribution of course materials.

---

### CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

BRUCE R. STEWART

*Counsel of Record*

CHARLES H. CARPENTER

PEPPER, HAMILTON & SCHEETZ

1300 Nineteenth Street N.W.

Washington, D.C. 20036

(202) 828-1200

Dated: May 29, 1992 *Attorneys for Learning  
Resources Network*